United States District Court

Southern District of California

THE SHERWIN-WILLIAMS COMPANY,)
)
Plaintiff,)
)
vs.) Case No. 13-CV-1946 LAB
) Motions in Limine
JB COLLISION SERVICES, INC.,)
et al.,)
)
Defendants.) Monday, November 16, 2015
_______________________________)
)
AND RELATED COUNTERCLAIMS)
_______________________________)

Before the Honorable Larry A. Burns
United States District Judge

Appearances:

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Record produced by stenographic reporter

San Diego, California - Monday, November 16, 2015

THE CLERK: Calling number 15 on the calendar, 13-CV-1946, Sherwin-Williams Company versus JB Collision Services. If counsel could please state their appearances for the record.

MR. WILSON: Thank you. Jeff Wilson on behalf of the Sherwin-Williams Company.

MR. WOODWORTH: Ed Woodworth on behalf of the Sherwin-Williams Company.

MR. SORRENTINO: Paul Sorrentino on behalf of the defendants and counterclaimants, your Honor.

MR. NORDLUND: John Nordlund on behalf of the defendants and counterclaimants, your Honor.

THE COURT: All right. Good afternoon. I'm sorry. With Mr. Wilson is Mr. Sorrentino?

MR. WOODWORTH: I'm Ed -- Mr. Woodworth here.

THE COURT: Mr. Woodworth, okay. And then let me make sure I have counsel's name correctly for JTT (sic) and JB Collision. Mr. Wilson, right?

MR. WILSON: No, no. Judge, Mr. Wilson here for Sherwin-Williams.

THE COURT: Okay. I'm sorry, Mr. Wilson. So it's Mr. Wilson and Mr. Woodworth for Sherwin-Williams.

MR. WOODWORTH: That's correct.

THE COURT: And then I have Mr. Cullen?

MR. SORRENTINO: Sorrentino, your Honor, Paul Sorrentino.

THE COURT: Okay. All right.

MR. SORRENTINO: We're actually -- we're on the defense side but also cross -- counterclaimant.

THE COURT: Okay. So Mr. Sorrentino and Mr. Nordlund?

MR. NORDLUND: Correct, your Honor.

THE COURT: Oh, okay. Got it now. All right. We are set to begin tomorrow, and there are just a few issues that remain. The Court has handled the bulk of the motions in limine in a written order that you should have received. I assume you got that order.

MR. SORRENTINO: Yes, your Honor.

MR. WILSON: Yes.

THE COURT: Okay. So by my count here's what's left: Four motions in limine remain. Defendant had moved to exclude Mr. McCord. He's the plaintiff's director of applications. He's developed and tested paint products, including those involved in the litigation. I'm told he's inspected the defendants' facilities, worked for the plaintiff's company 29 years, spent the last 15 years focusing on vehicle coating applications. Part of his job during that time was to misapply paint products and evaluate the resultant defects to identify how to make the products better and operating parameters. The plaintiffs have designated Mr. McCord, I understand, as an expert to testify regarding the application of paint products, the defendants' facilities and application process resulting in quality defects, and warranty claims made by the defendant and other body shops in California and Arizona and Nevada.

I've ruled in part on this; I've found that for the most part the motion to exclude is without merit. I find that Mr. McCord's background sufficiently qualifies him to testify as to the proper application of the relevant products and why he thinks the defendants' application of the products was faulty.

I think his background also convinces me under the Daubert standard that he has sufficient knowledge and experience and under the rules of evidence to evaluate and compare the causes behind customer complaints. Where I don't agree with the plaintiffs is why the defendant body shops have had more problems than apparently other body shops have had. I don't think he has any qualification to that. I mean that's obviously the jury issue. You can raise the inference from his testimony, but I think it's a matter for argument. So I have left this last issue open, and I'm happy to hear from counsel on that. I just -- I don't think McCord's qualified to come in and say well, the defendants are -- other than maybe reciting numbers of complaints from the various body shops -- but ultimately the inference is for the jury and it's for counsel to argue; it's not for him to offer an expert opinion on.

MR. WILSON: We don't disagree, your Honor. And with that part carved out of his summary disclosure of intent -- do I need to move up --

THE COURT: No, no, I can hear you from here. Just keep your voice up.

MR. WILSON: Sorry. With that carved out from his intended opinion evidence, we don't have anything else to argue about with respect to Mr. McCord.

THE COURT: Okay. Mr. Sorrentino, do you have any different view on that?

MR. SORRENTINO: No, your Honor. That will be fine.

THE COURT: Okay. So that's the ruling. You'll inform Mr. McCord that he's not to opine on why he believes this -- these body stops, JTT (sic) and JB, compared to others had more problems. I mean he can lay the groundwork for the argument, but that's as far as it goes.

The defendants have moved to exclude evidence of the sanctions that were issued against them. This -- in this case sanctions were issued by Judge Gallo against the defendants for failing to disclose responsive documents; these had to do with purchases from Keystone. My understanding of the evidence is, according to plaintiffs and really not disputed by plaintiffs, they were in -- at the time they were subject to an exclusivity contract to only buy paint products from Sherwin-Williams and use those. The question arose about whether the defendants made purchases from other paint suppliers, including Keystone, and I think the defendants originally took the position that they didn't or that they'd only done it a couple of times. Turned out that Judge Gallo found that that was not true and that the defendants continued to insist on that when they knew otherwise, so he sanctioned the defendants for that -- well, let's be charitable and call it a misunderstanding -- and now the question is whether evidence of the Court's sanction against the defendants can be presented to the jury.

I don't think the sanction by the Court has any relevance at all. I -- as you saw in the first order that I wrote on this, I think that the plaintiffs are certainly free to point out that the defendants have taken inconsistent positions and that they've had to retreat from those positions and correct and change; and you can argue whatever you want about that, that that was nefarious and deliberate on their part or it was sloppy on their part, but, you know, whatever the reason was that the number of Keystone purchases turned out to be way more than they first represented and then second represented and third, I'll allow that evidence.

But the fact that the Court sanctioned the defendants from that, you know, I don't see any relevance for the jury. I mean all that does is kind of put the Court's imprimatur on the, you know, the pickle that the defendants have them in by not getting that fact right in the first instance. Mr. Wilson, do you see it any differently?

MR. WILSON: Well, your Honor, the -- just to be clear on the distinction between the findings by Judge Gallo that were not appealed or objected to to your Honor as opposed to the findings after an in-camera inspection of all the Keystone documents as opposed to the sanction amount or the fact that a sanction was imposed, that to us -- that distinction -- if the Court is saying it's to the latter only, we -- we don't need to present to the jury the fact that a sanction was imposed.

THE COURT: I'm reluctant, Mr. Wilson, to have the -- have evidence that the Court weighed in on this and agreed with one side against the other. I just think that that is kind of fraught. Now, you know, I don't -- I don't know why this can't be handled, from the defendant's perspective, with a stipulation; you know, you now are stuck with what the Court has found happened. And I would think that the most sanitized way for this information to get in front of the jury is in the form of a stipulation. That way I don't have to deal with the tougher issue of if the defendants contested, you know, then we're down to the nitty gritty on well, the Court's made a dispositive decision on this and it's not in favor of the defendants, it's against them, and that's the next logical step if this becomes a contested issue. I can't force a stipulation on anyone, Mr. Sorrentino, but I would suggest that, you know, a stipulation is the way to handle this without -- one that tracks the Court's findings but without injecting the Court or -- or informing the jury that the Court has made findings on that.

MR. SORRENTINO: Understood, your Honor. And we did have some proposals in that regard, but all of the proposals of Sherwin-Williams, defendants were ordered by the Court, the Court found this, and so on. So that's where we ran into our problem on this issue.

THE COURT: Yeah.

MR. SORRENTINO: And I do want to say that we did not appeal it because we recognized that -- it was unintentional, but there was a mistake made, and the Court -- I don't know if the Court's record shows when we actually produced the documents, but it was actually before the hearing in which we were sanctioned by about two weeks or --

THE COURT: Well --

MR. SORRENTINO: -- so, so I don't -- it was a mistake, and we recognize it.

THE COURT: Yeah. Mr. Sorrentino, I can't -- my recollection was it was more than once though. I can't remember specifically, but I thought there was more than one mistake, and Judge Gallo at some point got frustrated and said look, you know, get your ducks in order because you're representing things to me and I'm trying to make a decision on the basis of representations and then it turns out they're not correct. And I sense some frustration -- Jack, am I right about that? Was it more than one misrepresentation that Judge Gallo found?

LAW CLERK BURNS: I mean I thought it was multiple interrogatory responses and --

MR. SORRENTINO: It was interrogatory responses. So you're correct about that; in other words, we're talking about one pleading in which my client failed to --

THE COURT: Okay.

MR. SORRENTINO: -- do what he should have done, and there was a mistake made. And we found it, we rectified it, and we got sanctioned. And we understand that, and we didn't want to waste anybody's time by appealing it; but by the same token, there is an explanation for it, and the explanation is in the documents themselves, and I guess we'll deal with that at trial.

THE COURT: Well, Mr. Wilson, can you think of a way that we can sanitize this? My concern under Evidence Code 403 is that this unfairly prejudices the defendant if I throw the weight of the Court behind, you know, a factual issue in the case, and it -- and it does tend to do that; there's a tendency if the jury knows that a Court's ruled against one side and said you were wrong and you persisted in being wrong -- I don't want to do that. It's one thing for you to prove that they were wrong and there were misrepresentations made; it's another thing for "and by the way, the Court agreed with us" -- that's the part that troubles me.

MR. WILSON: Well, your Honor, there are a couple things. To that point, one is we did attempt -- and we provided a series of about five or six or seven different stipulated facts related to this Keystone issue --

THE COURT: Do you have a copy with you?

MR. WILSON: We -- I can read them. We probably --

THE COURT: Mr. Sorrentino, you appear to have a copy. Do you have a copy of the proposed stipulation?

MR. SORRENTINO: I -- I do.

THE COURT: The vice was, Mr. Wilson, as Mr. Sorrentino was reciting it, it specifically and expressly alluded to Court findings, which is the very thing I'm trying to avoid here. You want to present that? Can I take a look at it? You okay --

MR. SORRENTINO: Yeah, but you got -- you don't -- you can't look at my notes.

THE COURT: Okay. I won't.

MR. SORRENTINO: Should I approach or --

THE COURT: Yeah, please. Hand it to the court clerk.

MR. SORRENTINO: I've turned to the page.

THE COURT: What do the notes say, no and hell, no?

MR. SORRENTINO: It says Judge Burns is the greatest judge in the whole world --

THE COURT: Well, good.

MR. SORRENTINO: -- and we can't wait to see him again.

THE COURT: Yeah. Although it was Gallo that handled this part, right?

MR. SORRENTINO: Yes.

MR. WILSON: Yes.

THE COURT: Where do the -- where do the proposed stipulations start, on the page that you handed me, Mr. Sorrentino?

MR. SORRENTINO: On the page I handed you is the page on which the -- the documents concerning the Keystone issue, which is what the issue we're dealing with.

MR. WILSON: Is it number 57?

THE COURT: It was starting at 64.

MR. SORRENTINO: It was your original. I don't know that -- I don't have --

MR. WILSON: Your Honor, I could just simply read them. There aren't that many.

THE COURT: Okay. Go ahead.

MR. WILSON: The first one is, Defendants were ordered by the Court to produce to Sherwin-Williams all records of paint and related product purchases they made from September 2008 to the present from any other manufacturer. Okay. That was one.

Two: JB Collision told Sherwin-Williams -- and here's where maybe take "the Court" out, and this Court -- so JB Collision told Sherwin-Williams and this Court that there were no records because between September 2008 to the present, it was -- it exclusively bought automotive paints, coatings, and related products from Sherwin-Williams.

THE COURT: Think it's a good suggestion you take "and this Court" out.

MR. WILSON: Okay. The next one --

MR. SORRENTINO: Well, your Honor, the first one too would be a problem because it says "ordered by the Court" when it should have -- we believe it should have just said Sherwin-Williams requested these documents --

THE COURT: Yeah, I agree. I agree. That puts it in the most neutral sense --

MR. SORRENTINO: Yeah.

THE COURT: -- that you requested and that the representation came back, and the second one, that -- whatever it was. Tell me number 3.

MR. WILSON: Sherwin-Williams discovered, however, that JB Collision purchased from Keystone between 2008 and 2012 thousands of dollars of products that JB Collision was required to purchase from Sherwin-Williams under the 2008 supply agreement.

THE COURT: Okay. There's no disagreement about those as facts, correct, at this point?

MR. SORRENTINO: Well, except that they discovered it because we produced documents.

THE COURT: Well, okay.

MR. SORRENTINO: When we found the mistake, your Honor, we produced the documents.

THE COURT: Yeah, that -- that's okay though. I don't have a problem with that as worded. Next, number 4?

MR. WILSON: Products such as paint, razor blades, 3M products, reducers, et cetera, were all purchased from Keystone. JB Collision should have purchased these products from Sherwin-Williams.

THE COURT: Tell me the products again mentioned.

MR. WILSON: Paint, razor blades, 3M products, reducers, et cetera.

THE COURT: Is there an inconsistency, Mr. Wilson, in the Court's ruling as to what the contract was limited to?

Did it include all those things? I remember at one point Sherwin-Williams took a -- what I thought was an overly inclusive position that JB and JTT (sic) had to purchase all these things, and I think I construed it in one of the summary judgment motions as saying only paint and paint-related products. Do these things that you've recited fall within the definition of paint and painted-related products?

MR. WILSON: All of them do, and just as importantly, two of their witnesses, including Mr. Tyczki, admitted that they fall within that.

THE COURT: Mr. Sorrentino, do you have any disagreement with that? I mean I don't want to revisit the Court's rulings, but --

MR. SORRENTINO: I --

THE COURT: -- do you agree that the recitation of items that Mr. Wilson just gave fall within my ruling of what is within the contract?

MR. SORRENTINO: Yes, but the way that these -- that offered stipulation is phrased is inaccurate factually.

THE COURT: How so?

MR. SORRENTINO: Because my clients thought it was to enter into the contract on September 10, 2008. The product, AWX, was not installed until the end of the month; we have documents to prove it. So my client had to continue to buy paint from the prior contract that they had, and then within a few weeks, the AWX was pulled out of his shops and didn't get put back in until April, May, and June of 2009, so --

THE COURT: I'm not going to foreclose you from proving that, but -- I mean the only troublesome part -- the only troublesome part is if we're kind of nickeling and diming over the closing of one contract and the opening of another. But I would assume that the thousands of dollars excludes even the last month of their agreement with Keystone.

MR. WILSON: Right. And this was -- this has been what has been litigated through this Court. That was the argument made. Judge Gallo said Mr. Wilson, do you have -- if it's what he's saying -- not him -- if it's what Mr. Sorrentino is saying, that it was just at the beginning of the contract, then, you know, I don't think this is what you think it is. If, however, it's throughout --

THE COURT: -- continues, yeah.

MR. WILSON: -- the contract, show me that. We gave him an extensive stack of documents showing all throughout, and he made that in-camera inspection, and that's the finding he made was no --

THE COURT: Okay. Yeah --

MR. WILSON: -- it was all through --

THE COURT: I agree with the defendants on that. They're not nickel and diming you saying oh, you know, we're going to play "gotcha" because you had to fulfill the --

MR. SORRENTINO: The plaintiff --

THE COURT: -- former contract in the last month. The "thousands of dollars" representation would apply to what they were able to discover occurred after that month expired and going forward until the problem came to a head.

MR. SORRENTINO: But it's not just that month. That's not -- that's what I was saying is they took the product out of our shops --

THE COURT: I understand.

MR. SORRENTINO: -- and did not give it back for eight months.

THE COURT: You know --

MR. SORRENTINO: We did purchase --

THE COURT: -- you want to offer proof on that, Mr. Sorrentino, you're able to, you're able to, but, you know, their legal position is you weren't allowed to do that. Now, you can say --

MR. SORRENTINO: Well --

THE COURT: -- what were we supposed to do, have no paint then --

MR. SORRENTINO: -- that's the point --

THE COURT: You're --

MR. SORRENTINO: -- that's why we don't believe we should have, and that's my problem. I'm not trying to nickel and dime them, your Honor, but it says we should have --

THE COURT: Put in this context though. The context is a request for production of documents that show a certain thing, a representation that such documents don't exist, a discovery that they do exist. That's what the context is. I assume that these stipulations are going to be read seriatim, one right after the other, so the jury will understand it's in the context of Sherwin-Williams saying wait a minute, we think that you bought paint during the period of our exclusive contract with you from someone else, and sure enough you said no at first, we found documents that showed thousands of dollars.

Now, if you want to explain that, I'm not going to foreclose you from explaining it. But the stipulation seems correct and seems neutral to me, there's no reference to the Court sanctioning anybody, so I'm going to permit that. What's next, number 4?

MR. WILSON: Next is JB Collision's purchases from Keystone ceased in 2012 when Keystone sued JB Collision and Mr. Tyczki for breaching its contract. That's when they stopped.

THE COURT: I don't have a problem with that. That's not the Court's imprimatur. I mean that's suggestive that -- of consciousness of guilt: We knew we were doing something wrong, so we stopped doing it at that point.

MR. SORRENTINO: No, no.

THE COURT: That seems like competent evidence to me.

MR. SORRENTINO: Your Honor, he's talking about Keystone suing my client. Has nothing to with this case.

THE COURT: Oh, okay. I misunderstood.

MR. SORRENTINO: Here's the problem because, your Honor, it goes back to the first part of your order. He's mixed up and he's caused you to mix up two things. We had a contract with Keystone from 2005 to September -- actually August 18, but we'll say September 10 of 2008 -- and that's where the -- the lawsuit between Keystone and my client resulted, four years later. It had nothing do with anything purchased after September 10, 2008. And as a matter of fact, your Honor, we kind of won that case.

THE COURT: You're right, I am confused then. I thought your evidence, Mr. Wilson, was that during the course of your exclusive contract with JB -- JB -- it was JB, the first, one, right? JTT (sic) followed, and --

MR. WILSON: Correct.

MR. SORRENTINO: Right.

THE COURT: Okay. I thought you have evidence that during the course of that exclusive contact -- contract, they continued to purchase from Keystone.

MR. WILSON: Absolutely, and --

MR. NORDLUND: They did --

MR. WILSON: Excuse me.

MR. NORDLUND: I'm sorry.

MR. WILSON: Evidence -- what the evidence showed, and that is what they denied. And not just a few. I mean we're talking in deposition, in --

THE COURT: That's what I -- that's what I've understood him to say so far, Mr. Sorrentino --

MR. SORRENTINO: No --

THE COURT: -- that we're talking about during the course of your contact -- contract -- and putting out -- for the time being putting out of consideration the last month that you were obligated to Keystone; he's not making an issue of that and Judge Gallo didn't and I wouldn't either; if it was just a matter of some overlap, then we don't have a problem. The problem is that, you know, going forward from August of 2008 all the way to what, 2011 --

MR. WILSON: The end of 2012.

THE COURT: -- '12, they have evidence of additional purchases from Keystone, which were denied at first, and then they get responses that say well, the denials were not accurate, we did do those purchases. Now, you have an explanation for why you did, I'm going to permit you to put that on, but he's right to say we asked for this, we were told didn't happen, never happened, and then they found evidence that it did.

MR. SORRENTINO: And I'm fine with that, but that's not what the offer is here. The offer is that my client, for some reason having to do with this case, stopped purchasing from Keystone in September -- and by the way, it was September of 2012; it was, to be exact, September 12 or 14 -- and that has nothing to do with this case. He stopped because they got into a dispute over the stuff that he bought and buy out of his contract from 2005 to 2008. That's what I'm saying.

THE COURT: Mr. Wilson, as to the last proffered stipulation, Mr. Sorrentino is right, I missed the parts that had to do -- I had understood you to say the Keystone buying stopped when this lawsuit against JB was filed by Sherwin-Williams; you're not saying that?

MR. WILSON: No because we -- they had already stopped buying from us four -- four months before, eight months, six months before we filed the lawsuit.

THE COURT: Why would we make any reference to the Keystone lawsuit?

MR. WILSON: Okay. Because the purchases themselves -- and, you know, I have the -- you know, we had broken down -- these are throughout the contract term. I mean I'll -- I'll get this done. I mean we just took the number of Keystone purchases by quarter; it went throughout. Those themselves breached the contract every time. The lawsuit itself breaches the contract, that -- they were sued and didn't tell us about, that breaches our contract. The fact that the only reason they stopped buying Keystone, okay, was because they got into an argument with Keystone. It is relevant, highly relevant evidence as to what it was that the reason that they're saying now is that we had to buy this stuff. They bought it because they were in -- they were in a dispute, and they were trying to buy down their prior contract by buying paint and paint-related materials from Keystone. And then when -- four years, about the statute of limitations time comes up, Keystone says well, we're suing you for 168, whatever it was, we're suing you, and that's when they -- there's an email, he says, look, I've been buying from you all along, I'm going to stop now. And --

THE COURT: You want to offer that as an admission that they were buying from Keystone in violation of the contract, that's fine.

MR. WILSON: Sure.

THE COURT: I just don't see any relevance to the Keystone litigation in bringing that up. You're down a tributary that's far away from the main channel here. Look, I mean one of the head-scratching things as I went through everything again this weekend was why aren't they focusing, both sides, why aren't they focusing on the main issue. The main issue, as I see it in this case, is either Sherwin-Williams's paint was defective or it wasn't, either they misapplied it, either it was their application of it that screwed these 35 cars up or it wasn't.

MR. SORRENTINO: Agree.

THE COURT: That's the main issue. So to bring in a lawsuit against Keystone and this and that -- I understand the relevance of saying part of our contract claim, part of our breach-of-contract claim is they were supposed to buy from us only, they didn't, they told us they were, that turned out not to be true, here's evidence that shows they admitted buying from Keystone during the period of time -- but we don't need to do that, we don't need to do that by mentioning the Keystone lawsuit. I don't see any relevance to that.

MR. WILSON: Can I -- just to make sure at least I'm clear to you. The fact that they were sued and did not tell us about that, there's a specific contract provision that says you must tell us about any lawsuit, any litigation --

THE COURT: Right.

MR. WILSON: -- that occurs that might impair your ability to buy, and it's -- it's a breach of the contract.

THE COURT: So you're saying that they hid the lawsuit because --

MR. WILSON: Yes.

THE COURT: -- that would have exposed them buying this stuff. But you got beaucoup evidence that they were buying this stuff from Keystone already.

MR. WILSON: I hear you.

THE COURT: I mean this -- well, then why do you need it? It's cumulative now, and there's probative danger to it because then they're in a position where they have to say well, we were righteous in suing Keystone and wasn't for that reason. And as I said, we're off in a tributary that -- you guys are going to have the jury thinking they have to resolve that in order to get to a resolution of this.

The Court excludes the evidence of the Keystone lawsuit. I will allow evidence of any admissions made by JB in connection with that lawsuit that they were buying products from Keystone during the course of the exclusive contract with Sherwin-Williams, but there's not to be any mention of the ancillary Keystone/JB lawsuit; you've got enough.

MR. WILSON: Okay. I understand. And just to be clear so that I don't trip over that ruling, which I will naturally follow, is the way we found out about the purchases was the exhibit Keystone put into that evidence, into the arbitration -- I'm not going to argue they were -- not going to mention that they were sued --

THE COURT: I don't even want you to mention the arbitration. I just want you to say that we, you know, we have a document that was filed under penalty of perjury with -- by JB, and it says these things. That's enough to get the substance of the information across to the jury.

MR. WILSON: Okay. Understood.

THE COURT: As I'm -- as I'm tracking this now, what we're trying to do is agree on acceptable stipulations that you'll stand up and --

MR. WILSON: Right.

THE COURT: -- read, and Mr. Sorrentino will say on behalf of the defendants, we agree that those facts are uncontested, we might have some explanation about the background, but we agree that those facts are uncontested.

So tell me -- that's -- we're through four, you said you had five. What's the fifth?

MR. WILSON: Well, the fifth one is the one that we've already talked about, that we've already said, you know, it falls -- it's all about what the Court ruled, so it's just -- I'm happy to read it, but it's the Court ruled this and they've been sanctioned that; we've already talked about it --

THE COURT: Yeah, that one's out.

MR. WILSON: -- so I didn't --

THE COURT: So the first -- the first four elements, subject to the refinements that I have made here that -- that removes reference to the Court being involved in this but at the same time acknowledges that the defendants say we said one thing once and then we said something at another time, I'll permit you to put that on; you can put on admissions as long as they're sanitized to show that they didn't occur in the course of a lawsuit. I don't want mention made of the Keystone/JB lawsuit.

MR. WILSON: Okay.

THE COURT: And I think that gives you the force of the evidence that you want.

MR. WILSON: And if I could just -- I agree, and that's -- that's how it's going to be, and I don't have a problem with that. I just want to make it clear: The reason -- what we brought up in our response and the Court I think alluded to perhaps in the order, if I'm not misquoting, was that, you know, on the other hand, you know, references by them which they've made clear that they intend to make about this Court's finding regarding spoliation, that they are going -- they have stipulations that they've offered -- they want to say this Court found that -- that Sherwin-Williams did something with the Qualtech colorants.

THE COURT: Sauce for the goose, sauce for the gander. I mean I think that ought to be the subject of a stipulation too.

MR. WILSON: We did stipulate.

THE COURT: There's no question that a request was made and thereafter the toner was disposed of.

MR. WILSON: And we've submitted that. We agreed to all of those.

THE COURT: Okay. So, Mr. Sorrentino, I would handle that issue --

MR. SORRENTINO: Oh, you have --

THE COURT: -- I would handle that issue the same way. I don't want references to what the Court found and the Court did this and the Court agrees with us on this; those should be eliminated from any stipulation. And any witness -- no witness should say well, I'm informed that the Court did this or that. You should go over this with your witnesses, both sides --

MR. WILSON: We will.

THE COURT: -- to make sure that the specter of the Court agreeing with one side or the other's argument doesn't come into evidence.

MR. SORRENTINO: Your Honor, we've already submitted the final, and there's nothing concerning spoliation concerning this Court's order --

THE COURT: Okay.

MR. SORRENTINO: -- nothing at all, so that's --

THE COURT: All right.

MR. SORRENTINO: Yeah.

THE COURT: If there's any question that gets close to this and you think well, I'm going to have to put something on here that might be viewed -- then approach and make sure you clear it in advance before we have to do damage control.

MR. SORRENTINO: Understood. Your Honor, I do want to mention one thing so that we're all aware of -- well, least the Court is aware of it. The documents concerning the Keystone arbitration were produced by us because we received them as evidence; they were given to us as evidence in the Keystone arbitration. However, the arbitrator found against the validity of those documents because they had no backup information for the documents, which is one of the reasons why we -- I consider us winning that arbitration. And there was no foundation then in that lawsuit.

THE COURT: You've lost on that issue here though. Judge Gallo determined that you were aware of it and you should have turned those over --

MR. SORRENTINO: No, those aren't -- I'm not -- I'm just saying that the documents themselves, there was never foundation, even in the underlying case, which is why the arbitrator threw them out in the first place.

THE COURT: Well, we're not going to be talking about the arbitration --

MR. SORRENTINO: I just wanted --

THE COURT: -- so there shouldn't be any -- there shouldn't be any reference to that either. I don't want to hamstring them and say don't bring up the Keystone/JB litigation and then it comes in the back door. If you do that, you're going to open the door to them getting in what they wanted to, which was, you know, you ended up suing and didn't tell them about that. I'm not going to allow that in affirmatively, but don't -- don't open the door to that.

MR. SORRENTINO: I have no intention of it, but I -- the reason I'm bringing it up is because I want to make sure that there's not going to be a question about that -- not from me because I -- because I don't want a minitrial on this because that's what it will have because --

THE COURT: I doubt that Mr. Wilson's going to bring up anything about the arbitration now. I've told him that, so there's no mention. So whatever the arbitrator found is neither here nor there. What Judge Gallo found is here or there, but the jury's not going to be told about that; it just informs why we're having a stipulation along the lines that we discussed. Let me move to Mr. Lewarchik; is that how he pronounces his name?

MR. SORRENTINO: Yes.

THE COURT: Now, there's a problem here, and it's -- it's not insoluble, but it's a problem, and it's going to take some nimble tightrope walking by -- by the defendants on this.

Mr. Lewarchik was -- was slow to get all of his opinions out, and he offered opinions but then he offered different opinions, and he did so late, and Judge Gallo determined that it was too late for them to -- to be used. And I don't know if that was -- was that appealed to me? Was that issue appealed?

MR. SORRENTINO: Yes, it was. It was --

THE COURT: And I agreed with -- I agreed with Judge Gallo, so what I did is I excluded the last opinion in the second expert report that had to do with him doing some actual testing; he had not done that before.

MR. SORRENTINO: It's actually the third report, your Honor.

THE COURT: Third report.

MR. SORRENTINO: Yeah.

THE COURT: Okay. So that's not to come in --

MR. SORRENTINO: Right.

THE COURT: -- and it's very clear that that's not to come in. But it puts us in a situation where the questions are going to have to be very carefully phrased to Mr. Lewarchik. First, he's to be told that under no circumstances is he to testify about his testing; that opinion's been excluded. So I want you, Mr. Sorrentino, to sit down with him and say no matter what question you're asked, you're not to blurt out anything about any of the testing because the judge has made it very clear that's not to come in front of the jury, so even if you think you're being asked about that, you're not. That's not to come out. The plaintiffs have moved to exclude that, they've gotten a favorable ruling from Judge Gallo, and I affirm that ruling. And I agree that it should have been one of his original opinions; it wasn't produced timely, can't come out.

That leads us to the problem with the substance of his testimony. I wrote in the in-limine motion that even if the defendants make it over the Daubert hurdle, it's still unclear how Lewarchik can testify as to his timely and admissible opinions without divulging his untimely and inadmissible opinions. I'm not going allow the defendant to benefit from the decision to ignore the Court order and continue with testing. So that's the dilemma here.

I think this is going to require some coaching on the part of the defendants, and I've already suggested to you that Mr. Lewarchik should be told that he's not to mention that he performed this test whatever he's asked. And I think from plaintiff's perspective, in examination of Mr. Lewarchik, you're going to have to be specific in the questions you put to him, maybe using a specific reference to as of this date here's the opinions you offered, I'm only asking you as of this date, was it your opinion thus and so. And that will -- that'll help confine him to the period of time that we're talking about with admissible opinions.

But the substance of this ruling is that the last opinion, the untimely one, is not to come in and that Mr. Lewarchik is to be told that in advance, and, you know, don't do it, don't do it, don't say anything about having done the testing on the toner, right?

MR. SORRENTINO: Correct.

THE COURT: Is that right, Mister --

MR. SORRENTINO: He did have other opinions, but --

THE COURT: Yeah, that's excluded, so -- but I need cooperation from the plaintiffs in the examination of this fellow too so he's not asked an open-ended question that would likely elicit that; you're going to have to nail down the dates and put an opening and closing on each of the questions you put to him so he understands that the only opinion you're eliciting is an opinion as of this date when he wrote the last admissible report. You have it, Mr. Wilson?

MR. WILSON: Your Honor, I want -- I want to be -- I guess I want to make sure that you are permitting him to offer any opinions on causation then?

THE COURT: I'm not going to permit him to offer anything that implicates the testing. He didn't do any testing originally, correct?

MR. WILSON: Correct. And with -- I'm sorry.

THE COURT: And in the third -- the third report he offered an opinion after doing the testing which he was told not to do or, you know, it was too late, right?

MR. WILSON: Correct.

THE COURT: So that's an excluded opinion.

MR. WILSON: Right.

THE COURT: Now, the problem is I can see you wanting to cross-examine him and undercut the opinions by saying well, you didn't do any testing. The way you do that is, you know, as of the day your final opinion was issued in this case, you hadn't done any testing, correct? Okay. So you follow? I mean that's the way to buttonhole this and keep it confined so that he's testifying truthfully and you can still undercut the opinion by showing there was no testing done as part of his reaching the first two opinions.

MR. WILSON: Well, your Honor, I just -- again, we will do that. However, without any scientific testing, which he has not done, the opinions offered that are -- that are listed in his report of January 16 are not admissible. They are not reliable, they cannot possibly pass muster under Daubert and Kumho because they are admittedly just his initial probable, you know, opinion, a strong opinion about probability and -- but he needs more testing, and it's just based on his chemical intuition. So these -- these opinions that are stated on January 16 are -- they are without any support admittedly, and so he shouldn't be allowed to --

THE COURT: I've addressed that already though in the written order on the in-limine motions. What I found, Mr. Wilson, was this: That indeed he had not conducted any testing up to the point that he had offered admissible opinions. He wanted to do so, but he wasn't able to do so before the discovery period closed. I've treated your Daubert objection in the written in-limine order, and I said "That said, Mr. Lewarchik has a lot of experience in the paint industry. It's not clear to me, based on the showing made, that it's absolutely necessary for him to test in order to render the opinions," and I found that the lack of testing would go to the weight of his evidence rather than to its admissibility. I stand by that. That's at docket 237, pages 12 through 17.

MR. WILSON: Oh, I'm sorry. I was looking at -- says with McCord. Okay. I'm finding it now.

THE COURT: So I've overruled the Daubert objection, and I'm going to allow him to testify. Now, is he going to take hits because you say look, you know, wouldn't it have been better if you'd tested by this date before you rendered your final opinion? Well, yeah, I'd like to have done so. You didn't do so though, did you? No, I didn't. That's the way we should leave it. So you're going to have to be really tight on the questioning and tie it in to dates and tie it in to the last, you know, admissible report that -- that he filed.

MR. WILSON: Okay.

THE COURT: Follow?

MR. WILSON: Well, I -- I just want to be clear. On page 17 of your order, you had not actually ruled. You said you were going to talk about it here at the hearing, but you -- you were -- you know, your -- everything is phrased as "if he makes it over the Daubert hurdle," "if he's permitted to testify." And what I'm saying, Judge, I'm here to argue that the jury should not be able to hear -- or should not hear unreliable opinion testimony about causation, which is what he is going to do based on an admitted lack of any testing methodology or scientific rigor or intellectual rigor, as you mention, and so he -- he should not be able to -- to present those opinions that are listed in that January 16, 2015 report. And that -- that way there is no need to carefully ask him questions phrased "as of January 16." His rebuttal is something else. But his opinion about what caused this product to allegedly fail or what caused the alleged defects is not supported. It's not -- it doesn't pass Daubert, and it shouldn't. And your Honor left it for this hearing to understand, as I understand it, to discuss and actually rule on the Daubert challenge.

THE COURT: He used the term -- he stated it as probabilities, that the probabilities -- I'm looking at page 14 of the Court's order and his deposition testimony from February 27, 2015. He did -- he answered at the bottom: I could answer that probably best by saying that I have pretty strong opinions in term of probable cause, but I need to do additional testing.

Now, that's not definitive, and I think he could be attacked because he didn't do the testing, but he still had strong opinions of probability. I don't think more is required. I find that his background was sufficient to allow him to render those opinions. And you may say look, this isn't worth much because he never did any testing and he even acknowledges that he should have done testing; and, again, using tight questioning "as of the day that you issued your final report, you hadn't done any testing, correct," he'd have to answer correct.

So I -- you know, I understand your point that it was left open, but I really think that there is -- that he does cross the hurdle of having background experience and training and having an opinion on probability that's helpful to the jury and that the absence of testing is a factor that maybe undercuts the opinion but doesn't cause it to be excluded. So that's my ruling on that. To the extent that it wasn't clear in the motion in limine, I now make it clear.

MR. WILSON: Is that -- is that for all of this three, four, five, six --

THE COURT: For the --

MR. WILSON: -- seven different opinions?

THE COURT: -- for the admissible opinions that were rendered in timely fashion pursuant to the discovery order that Judge Gallo issued, I'll permit him to testify to those. Again, I can't make it clearer than this: The caveat is he's not to disclose to the jury that he actually tested at some point after the discovery period closed and he wasn't authorized to do so. You can help him stay on track, Mr. Wilson, by, as I said, phrasing the questions in terms of as of the date of your last -- you don't even have to say admissible -- of your last report, expert report, you had not tested and you acknowledge that testing would help you confirm one way or the other, isn't that true? Right? Then we don't have a problem.

MR. WILSON: Well, I just -- I mean, your Honor, respectfully I disagree that if the jury hears an expert allowed to opine about causation who admits that he didn't do the testing he needed to do that opinion, they won't --

THE COURT: He doesn't admit that.

MR. WILSON: -- get -- okay.

THE COURT: He doesn't admit that though. You're overstating what he says. What he says is -- and I've read it to you -- he says "I have pretty strong opinions in term of probable cause." Well, that's as far as it goes. And I find that he's got background and training and that that opinion, snipped as it is, would be helpful to the jury's understanding of this.

Now, is he going to take some hits when you say, you know, look, you know, you don't do any testing, right, and you even acknowledge that you'd want to do testing, but you didn't do any, did you, as of this date. He's going to take some hits on that. How effective his testimony is I don't know, and I'm not foreclosing you from -- your expert's McCord, right?

MR. WILSON: We have two experts, Judge; we have Brown and McCord.

THE COURT: Okay. I'm not foreclosing you from proving that no self-respecting expert would come to a conclusion without doing testing. So there's going to be plenty of evidence on that, and this is the way that I accommodate the ruling that actually benefits you by not allowing the defendants to profit from a discovery violation. That's the only way I can think to do it. So that's the ruling.

Mr. Sorrentino, I'm going to tell you one more time so we're very clear. There's going to be a big problem if --
MR. SORRENTINO: Lewarchik.
THE COURT: -- Lewarchik blurts out that he actually did testing. Those words are never to come out of his mouth --
MR. SORRENTINO: I understand.
THE COURT: -- during this proceeding.
MR. SORRENTINO: But if he is asked did you ever do any testing, we're not going to expect him to lie. So you've already done what you -- you've already made the comment about that, so --
THE COURT: I don't think Mr. Wilson will --
MR. SORRENTINO: -- I don't think --
THE COURT: -- Mr. Wilson's not going to blunder into a mistake like that. I've told him to keep it tight and circumscribed so that Lewarchik knows everybody's on the same page, we're only asking about up through the time of the admissible reports, and he's not to volunteer no, only afterwards did I --
MR. SORRENTINO: No, no, absolutely not.
THE COURT: -- you know -- all right.
MR. SORRENTINO: Your Honor, may I just say this once? It's just -- you made a comment that we're not to benefit from a discovery violation. I just want to say we

got the testing documents, the testing documents, on the last day of discovery, actually a little -- right on the last day, November 7 of 2014, and we rushed and did everything we possibly could. And then in the middle of that -- well, with -- five days later the paint samples got taken that we were going to use. So I understand the Court's position, I'm not arguing with you, but to call it a discovery violation --

THE COURT: I'm not going to mention that in front of the jury; Judge Gallo found that it was in violation of the Court's discovery orders though, right?

MR. SORRENTINO: No. What he said was -- because when we had Mr. Lewarchik do this, continue on and do his testing, there was no order saying that we should not have done that --

THE COURT: Wait. I thought you said --

MR. SORRENTINO: -- after --

THE COURT: See, I have a different understanding. I thought Judge Gallo said no, no, this isn't going to be authorized because it's too late and they went ahead and did it and then he filed another report in contravention of what Judge Gallo --

MR. SORRENTINO: Well -- I'm sorry. We had to --

THE COURT: -- ordered, and --

MR. SORRENTINO: -- discovery motion on it. We had to.

MR. WILSON: Judge, and -- that's correct. And I want to make sure we're clear on something. They've listed the thrice-excluded third report now on their exhibit list as an exhibit they intend to offer.

THE COURT: It's not coming in.

MR. WILSON: Okay. It's on their list, it's not coming in, and --

THE COURT: They can put anything they want on their list, but Mr. Sorrentino and I are clear, it's not coming in --

MR. WILSON: Great.

THE COURT: -- and Lewarchik's not going to mention anything about having --

MR. WILSON: Great.

THE COURT: -- performed testing.

MR. SORRENTINO: It will not be offered, your Honor.

THE COURT: Okay. Okay. Good. We're all clear on that.

MR. WILSON: Okay.

THE COURT: Let's see. The last matter that I have here is the objection to the defendants' witness list. I don't know if this is aspirational or if the defendants intend to conduct three-minute examinations or what, but they've listed 92 witnesses. You have ten hours. Defendants have responded to that and said Judge, you know, you told us when you gave us the time slot that you're not going to try to dictate, you know, how we prune our tree, that's up to us. I think that's the way I'm going to leave it. It's not -- you know, it's not a suggestion, it's a time limit; I hope you know that, Mr. Sorrentino, and you've --

MR. SORRENTINO: Absolutely.

THE COURT: -- planned accordingly. I'm not going to be manic about it if you need an extra five minutes or ten minutes at the end, but the time limit for both sides is ten hours per side. So, you know, I think you better prune your tree here. Ninety-two witnesses in ten hours, I don't think you can do that.

MR. SORRENTINO: I'm -- and, your Honor --

THE COURT: It includes, by the way, your opening statement and your closing argument too; you know that?

MR. SORRENTINO: Yeah, that counts.

THE COURT: Just not jury selection.

MR. SORRENTINO: Okay. Your Honor, I have placed my final witness list, according to your rules, in order, in the order I intend to call them. Now, there may be people who can't show up, and because I had to cut the list -- I had to cut the line I guess from -- of, you know, from bringing in people from -- into the restaurant, we had to cut the line somewhere. Understood. But I've done everything I can, and

I have subpoenaed a lot of people, and there will be a bunch of 5-minute. I have everything timed out pretty well. But the one thing I did mention in my opposition, my response, was the plaintiffs haven't done the same thing. Now, I don't have a list in order, and I thought that you wanted us to have a list in order --

THE COURT: I did.

MR. SORRENTINO: -- so I'm concerned that I'm going to be left -- you're going to tell me Mr. Sorrentino, start your case, and I'm going to be standing here saying I didn't know they were done. I need to --

THE COURT: Mr. Wilson, do you have a list you can give Mr. Sorrentino?

MR. WILSON: Of course we did. We already did that.

THE COURT: All right. Well, give it to him again because he says he doesn't have it.

MR. SORRENTINO: Well, his colleague, his associate, told me he didn't think it was in order. If it's in order, then I'm fine.

THE COURT: Is it in order?

MR. WOODWORTH: We list -- we broke it out in order, your Honor --

MR. SORRENTINO: Okay.

MR. WOODWORTH: -- from the witnesses we will call, the experts we will call, and our may-call witnesses.

MR. WILSON: We listed five people, five versus 92, and what else is --

THE COURT: There you go, Mr. Sorrentino, and it says, you know, will-call and may-call.

MR. SORRENTINO: All right.

THE COURT: So that's the order.

MR. SORRENTINO: Well, it's not -- then I still don't know if it's in order, one through whatever. But then let me ask this -- because this a housekeeping matter -- I know your Honor is going to be very interested in the time limit. When can I expect to start calling my witnesses? Because is it three people or is it five people or is it the -- because they actually had 31 total on their -- on their witness list.

THE COURT: Look, look, you guys have worked together for much longer than you've been with me. You were here for I think argument on summary judgment perhaps -- did we have argument on that or was it done on the papers?

MR. WILSON: Pretrial.

MR. SORRENTINO: We were here --

THE COURT: Yeah, I remember pretrial. So you are used to working with each other. A very common thing is for you to say, Mr. Wilson, when do you think you're going to rest your case because I want to have my witnesses ready because I know the judge is not going to give us any time, if I don't have my witnesses here, he's going to cause me to rest, so I don't want to get caught short, you know, give me the courtesy to telling me when you think you're going to finish your case-in-chief. And he'll do that. Won't you, Mr. Wilson?

MR. WILSON: Of course. And I -- and just --

THE COURT: Okay. So some coordination between counsel is in order. I can't know the answer to these things.

MR. WILSON: Your Honor, can I just -- I guess as a housekeeping, we have -- we have counterclaims, counterclaims, and so we're going to put on what, three, four witnesses, whatever it was that we've listed, assuming everybody can be here, but whatever, you know, can't predict --

THE COURT: You're going to rest if they're not here.

MR. WILSON: Well -- what's that?

THE COURT: You're going to rest if they're not here.

MR. WILSON: Oh, I agree. No, I'm sorry. But then they're going to put their case on. Now, I know I have ten hours, but I have a rebuttal case that I get to put on as the counterdefendant.

THE COURT: Of course. So the shoe's on the other foot, Mr. Wilson. You go to Mr. Sorrentino and say --

MR. WILSON: That's all I --

THE COURT: -- Mr. Sorrentino, when do you think you're going to finish that defense case because I want to have my witnesses ready so, you know, the 600-pound gorilla doesn't jump me and say you're out of time, we're going to argument, right?

MR. WILSON: That's all I'm asking.

THE COURT: Okay. So that's the way it's going to work.

MR. SORRENTINO: My only question is should I -- and I guess I say it in open court -- should I be prepared to put on my first witness on Wednesday afternoon or not because I've got to call them, and that's what I don't know.

THE COURT: How long do you think it'll take? What's your estimate of how long it'll take to present your case-in-chief?

MR. WILSON: Tuesday after -- Tuesday morning -- well, we start at what, about Tuesday -- after jury, do we expect to start after lunch or before lunch?

THE COURT: Before lunch with opening statements and probably with the first witness. It usually takes, particularly in a civil case with only three peremptories per side, it'll take us an hour and a half to get a jury. Did I give you guys voir dire time?

MR. WILSON: You gave -- we submitted voir dire questions. I don't know how much time we have.

THE COURT: Did I rule on that in the pretrial conference whether you would be allowed to follow up? Jack, did I do that?

LAW CLERK BURNS: No.

MR. WOODWORTH: Your Honor, it just says in the chamber rules that there's no questioning permitted and generally you don't permit us to submit questions, but in this case --

THE COURT: Yeah, I've got the questions that you have submitted.

MR. WOODWORTH: Okay.

THE COURT: Here's what I'll do. I think I'll conduct the general voir dire, and I'll give both sides ten minutes each, no longer than ten minutes, to follow up with any particularized questions that you may have. So that's the way --

MR. WILSON: Okay.

THE COURT: -- we'll handle it. Mr. Sorrentino, let me go back to one thing about pruning your own tree here. I did make one ruling -- and correct me if I'm wrong about this -- but it had to do with the number of people, the 404 (b) type evidence, the number of people from other body shops that ran into problems with the paint, and I think I said pick your best three, did I not?

MR. SORRENTINO: No, you did not, your Honor.

MR. WILSON: Yes, you absolutely did.

MR. SORRENTINO: Your Honor, you said to me just what you said today was that I needed to be careful on who I'm going to pick because I'm going to run out of time. But the other body shops, it goes to the fraud. It doesn't go just to the -- to nonconforming good issue, it goes to the fraud, and --

THE COURT: In what way? You allege that representations were made to them about, you know, this being the best stuff available and so on and so forth?

MR. SORRENTINO: Not just that.

THE COURT: What else?

MR. SORRENTINO: Not just that. My client was told he was the only one who was having the problem. So were they. They -- he stated that instead of doing warranty paperwork, his sales rep was bringing him free product. Well, that -- and they deny that and so does the sales rep. Well, all the other body shops who have the same sales rep, this ain't true, saying oh, no, no, they were bringing them as well --

THE COURT: All right.

MR. SORRENTINO: -- et cetera, et cetera, et cetera. I have like about five or eight -- I won't say eight, but I think it is -- things that -- that show that he was lied to during the course of the relationship which caused him to remain in there, et cetera.

THE COURT: All right. I seem to remember saying pick your best three, but --

MR. WILSON: Your Honor --

THE COURT: -- at the same time, Mr. Wilson, I have to tell you as long as he stays within the ten hours, you know, I don't want to tread on him and tell him this is what -- this is how you have to devote your time. If he wants to call eight people -- I mean I would figure, Mr. Sorrentino, you'd probably want to pick your best three because you got a lot of other stuff you got to prove, and you've already heard me say it: It's not a suggestion, it's a time limit that's going to be enforced --

MR. SORRENTINO: I know.

THE COURT: -- if you run out of time, you have only yourself to blame, and that includes your final summation to the jury.

MR. SORRENTINO: Understood, your Honor. And I have -- because of that I have worked out a time for every witness that I know I can get here to make sure I'm under the limit. I've been very, very careful about that. May I ask though, since I have the cross -- the counterclaim, am I --

is the Court going to allow me to do -- so I'm going to have closing and then closing and rebuttal and -- I'm going to have some time for rebuttal, as long as I leave time, because I have the counterclaim? I just want to be clear because I have --

THE COURT: Right.

MR. SORRENTINO: -- I have to mark that down --

THE COURT: That would be the ordinary way to handle this, and that's what I intend to do.

MR. SORRENTINO: Okay. Thank you.

THE COURT: But, again, I emphasize to both of you, when your lips are moving, whether it's in a rebuttal argument or not, you're on your own clock, right? So, Mr. Wilson, if I did say that, I'm going to back off of it. I don't want to micromanage. You know, he's accepted the representation that I made that he's got ten hours, and he assures me he's going to finish within that period of time, and he must.

MR. WILSON: Your Honor, I just want to place on the record, you said that in -- he says you didn't say it. You said it. I relied on it. I have -- I have talked to my client; I told them that -- because they know this has been the case for two years -- they're going -- you know, they're calling everybody that -- this is part of our argument here -- about getting confidential agreements on non --

attorney eyes only on the names of our customers because of the things that Mr. Tyczki's said he's going to say about us to these people. Now, I told my client it's ten hours, and the first, as far as fraud goes, three body shops, and so we start drafting our presentation and our rebuttal based on that. And now I hear that he's going to have eight different shops come in, and each one of them are going to now say oh, I had these problems and I had this or that, and I'm -- you know, I'm going to what, not have -- I'm not going to be able to --

THE COURT: You know the eight shops that --

MR. WILSON: I have no idea. He listed 92 companies -- excuse me -- hang on. Many of these witnesses are listed as PMK of something and not --

THE COURT: Well, the something is -- the company is Sherwin-Williams, right?

MR. WILSON: No. Like the company of -- an insurance company or a body shop or a -- I don't even know what -- not a person with most knowledge of, you know, purchases or like a defect such as like a color-match issue.

THE COURT: Well, I'll fix that right now. Mr. Sorrentino, is it eight that you intend to call, eight other body shops?

MR. SORRENTINO: Your Honor, I have them listed here, and let me count them. I have them in order, so there's no secret. By the way, they've taken the deposition of a number of them, so --

THE COURT: Okay. I just want you to make clear to the other side --

MR. SORRENTINO: Sure.

THE COURT: -- who the representatives of the other body shops that were Sherwin-Williams clients that you intend to call in your case-in-chief.

MR. SORRENTINO: I actually only have seven because I'm -- I'm making the strategic decision right now to cut one of them out.

THE COURT: Okay. So --

MR. SORRENTINO: And by the way, your Honor, I had -- I had about 27, and initially you told me I could have 20 days, so I have done a lot to cut down.

THE COURT: But 20 days was an absurd -- that was an absurd estimate for this case. I mean come back to where we started. The issue in this case that's going to be dispositive is whether the paint's defective or not defective, whether it was applied correctly or not correctly. One side's going to win or the other -- win or lose on that issue. So all of -- 20 days to get to the bottom of that issue? Oh, my goodness, Mr. Sorrentino. You would have lost the jury, you know, three days into it.

MR. SORRENTINO: Well, I have seven, your Honor, and they're listed and they're in order and --

THE COURT: Okay. When this hearing is over -- when this hearing is over, I'd like you to walk over to counsel table and say Mr. Wilson, here are the seven body shops that I -- it was represented that I intend to call who are going to say we had crappy Sherwin-Williams paint too.

MR. SORRENTINO: I actually have the names; I didn't write PMK, I have the names.

THE COURT: Okay. Well, he's -- he's at a loss because he thought there were only three and he wants to know the other four, so you'll tell him that. Okay. I think that resolves the remaining issues in limine.

Now, there's another sore subject with me. I got this tome from the defendants, this thing, that's like airplane reading because it's so long that -- it's a proposed jury verdict.

MR. SORRENTINO: Oh, it was --

THE COURT: It's like an SAT. Do you really think I'm going to hand this to them and say go over this? Why would we not use just a general verdict?

MR. SORRENTINO: Your Honor, I -- I like using general verdicts but not -- I haven't tried a case with you before; I did not know if you wanted me to go cause of action by cause of action --

THE COURT: This goes more -- this goes more element by element on the claims; I don't want to do that.

MR. SORRENTINO: Well, I've had --

THE COURT: You either win or lose on the claims.

MR. SORRENTINO: I've had judges yell at me for not doing it, so there I am, so --

THE COURT: I hope I'm not yelling, but I hope also that you've gotten the impression that I'm kind of a less-is-more guy, so something like this as a jury verdict, you know -- and I don't even have their proposed jury verdict. I think the --

MR. WOODWORTH: Your Honor, we submitted that last --

MR. WILSON: We submitted --

THE COURT: Did I get it?

MR. WILSON: Yeah, we submitted that last --

THE COURT: When did we get it?

LAW CLERK BURNS: We got it on time.

THE COURT: Okay. Well, I do have it. It's equally long?

LAW CLERK BURNS: It's pretty long.

THE COURT: Where is it?

MR. WILSON: Twenty pages?

MR. WOODWORTH: Twenty-five pages.

THE COURT: That's like 13 pages too long.

MR. WILSON: Okay. But that's --

THE COURT: Sherwin-Williams has a single claim, right, breach-of-contract claim?

MR. WILSON: Well, two, yeah.

THE COURT: Okay. Two, yeah, JTT (sic) and JB. And then you have six claims left, right?

MR. SORRENTINO: Six or seven.

THE COURT: You have the breach-of-contract claim, you have a fraud claim, you've got an unjust enrichment claim --

MR. SORRENTINO: We have intentional misrepresentation, negligent misrepresentation --

THE COURT: Yeah. Which I don't --

MR. SORRENTINO: -- concealment --

THE COURT: You sure you want to -- you sure you want to pursue all of those? They sort of fold into each other.

MR. SORRENTINO: They do, but, again, I'm -- not knowing -- having tried a case with you, I did not know how you -- do we just say the jury finds for Sherwin-Williams and we just put a "no" there and then we have my clients and we have "yes" and just amount? I'm okay with that.

THE COURT: What I'd like is just a jury verdict form that looks at the -- at the crossclaims on breach of contract and rules for one side or the other and then awards damages accordingly.

MR. SORRENTINO: So no elements and no --

THE COURT: No. Yeah, I don't want that. I mean I don't want any elements in this thing. I don't think there's any reason for special findings other than damages, right?

MR. SORRENTINO: Again, I'm fine with that.

MR. WILSON: All right. Excuse me. Because -- part of the reason we had a little bit of a longer-than-usual verdict form was that, as you ruled in the order on your -- motion for partial summary judgment, this involves installment contract, and this is an installment contract under the UCC, and therefore there is a question that the jury has to decide about whether an install -- each installment, if it was a nonconforming good, whether it substantially impaired the contract as a whole. And so that -- that -- that has its own different instruction based on standard --

THE COURT: Okay.

MR. WILSON: -- Ohio law. Most of them are like -- frankly, a lot of what took up our room -- our time is the affirmative defenses, and I don't -- you know, I don't know your practice on this, but for each affirmative defenses, of which there are many, it is -- typically I would put has the other side, the defense, has the defense proved by a preponderance of the evidence that such and such affirmative defense applies and therefore, if it does, then so be it.

THE COURT: Why can't we handle that, Mr. Wilson, with just a general verdict form? They're going to be properly instructed that affirmative defenses --

MR. WILSON: Sure.

THE COURT: -- negate liability for a breach of contract, so it's implicit if they find for one side that they've ruled on one of the affirmative defenses in their favor or they find they didn't breach the contract.

MR. WILSON: I think our -- I think our jury verdict, the verdict form, is under ten pages if we take out affirmative defenses, which --

THE COURT: Okay. I'll look at it, and I'll take your point about the special findings that need to be made under the UCC, but the way we can do that is just a follow-on question after the general verdict if there's some special finding. The same thing with the fraud verdict; if we have to find, you know, malice, oppression, or something like that to get -- well, there's not --

MR. SORRENTINO: Punitives.

MR. WILSON: -- are seeking punitives. Seeking 28 million --

THE COURT: Yeah, okay. Then I can understand that we need a second question on the fraud verdict too. But that can all -- those two questions can be part of the same verdict form. I don't see any reason to have this many verdict forms for them to fill out, like I said, SAT-style when -- and, Mr. Sorrentino, I'd ask you to think about this before tomorrow. I'm not -- I'm not requesting that you keep duplicative claims here, so if you want to scuttle, you know, unjust enrichment and say look, this began as a contract claim, we think we're righteous on the breach of contract and that's how we're going to argue this, and yeah, there's different ways we can get to the same point, but why do that? Why confuse this?

MR. SORRENTINO: Well, your Honor, on the unjust enrichment claim, I have to say that there is a chance that the jury could find that we're both in breach and there is no contract, in which case the unjust enrichment claim survives.

THE COURT: All right.

MR. SORRENTINO: So that's why that's there.

THE COURT: That's fine. That's a principled reason for leaving that as one of the claims. What about all the others?

MR. SORRENTINO: Well, I -- we'll look at that, and --

THE COURT: I mean don't the intentional and negligent misrepresentations fold into the fraud claim?

MR. SORRENTINO: Not necessarily because negligent misrepresentations require a conscious act, an intent --

THE COURT: All right.

MR. SORRENTINO: -- whereas the negligence is that they just didn't know, and we have evidence I think of both.

THE COURT: Those claims are intact, and you're permitted to bring them even though they're -- they seem to be, to me, duplicative of other claims getting at the heart of the same issue, and it's obvious to me you can't recover -- putting aside the fraud and the unjust enrichment -- you can't recover multiple times for the same thing even though the claim is denominated differently. But at this point my preference would be to instruct -- or to give a verdict form on one breach-of-contract claim with perhaps a special question on the UCC issue that you have raised. And on yours, on the six claims that remain, with a special question on the fraud claim.

MR. SORRENTINO: Sure.

THE COURT: So get back to work on this or have the associates work on this thing. This needs to be pared down to no more than six pages.

MR. SORRENTINO: Okay.

THE COURT: Same thing with plaintiff's.

MR. SORRENTINO: Would you want one page per claim?

THE COURT: Yeah, per verdict form --

MR. SORRENTINO: -- questions --

THE COURT: Yeah, just per verdict form; you know, as to this claim here's how we find.

MR. SORRENTINO: Thank you. And do you want a caption on every page or was it just going to be --

THE COURT: Put a caption and we can -- we can edit it later if it's --

MR. SORRENTINO: Okay.

THE COURT: But not attached. I don't want attached.

MR. SORRENTINO: Okay.

MR. WOODWORTH: Quickly, to clarify, your Honor, from plaintiffs you only want verdict forms for the plaintiff's claims or do you want it for all claims or --

THE COURT: No, just yours. He'll give me his and then we'll have an instructions conference where we'll --

MR. WOODWORTH: Okay. Thank you.

THE COURT: -- sort it all out. Now, the other thing, I haven't touched on instructions yet. You fellows are going to have to be prepared to either work early in the morning or late at night because obviously I'm not going to delay the jury while we work on instructions. So at some point as we get close to Friday, we're going to have to settle on instructions, and at this point I'm not happy with all the instructions I have either.

I use Ninth Circuit pattern instructions to the extent that they apply on general principles of law. Obviously here there's choice-of-law provisions; I'm going to have to instruct according to Ohio law and, in some instances, California law.

MR. WILSON: For the fraud claims California law would apply.

THE COURT: Yeah. So I'm prepared to do that, but, again -- I just took a peek and I was afraid to look any further because I got a packet like this of instructions from somebody. And again, Mr. Sorrentino, so there's no question about it, less is more; that's how I see it.

MR. SORRENTINO: I think --

THE COURT: I'll instruct appropriately, but I don't want to instruct on every little thing.

MR. SORRENTINO: I think we did -- we have joint instructions as well.

THE COURT: Okay. We'll look those over, and as I said, we'll give them a good scrubbing at the instructions conference. Anything else?

MR. SORRENTINO: Does the Court have any rule as to -- we're still talking. Oh, we have the tutorial that -- that you sent already today I believe. I haven't seen my -- you had suggested or they had suggested and we had agreed to a tutorial that would not be charged against either side's time, and that was --

THE COURT: How long was that going to take?

MR. WILSON: Five minutes.

THE COURT: Good. Yeah, I'll give you that as a freebie.

MR. SORRENTINO: And then, you know, I sent a list -- I don't know what the Court's preference is on this or not, but I sent a list indicating what exhibits I would like to use in my opening, and I'd like to try to get -- I don't know how the Court deals with that.

THE COURT: Here's how I deal with it. Is there any -- have you seen the list? Is there any objection to those things? Are any of the exhibits challengeable on a legal basis?

MR. WILSON: I don't -- I think the exhibits are different than -- all the deposition testimony he's listed is he's going to read or show. I disagree. It's not admissible. So deposition testimony of non -- a non 30 (b)(6) witness, for instance, I don't agree that he can show deposition testimony in his opening. If it's a 30 (b)(6), that's different, you know, you're allowed to under Rule 32 (a)(3), but --

THE COURT: What's the offer of proof as to depo testimony of non 30 (b)(6) witnesses?

MR. SORRENTINO: Well, they're -- some of them are Sherwin-Williams employees.

THE COURT: Okay.

MR. SORRENTINO: I have Jose Garcia, I have David

Cardenas, I have Manny Andriano. All three are -- they are witnesses.

THE COURT: All of those would be statements of part opponents, Mr. Wilson.

MR. WILSON: They're not 30 (b)(6), they aren't managing agents, they are employees, and that is not permitted to be shown.

THE COURT: You're telling me that Garcia, who was the broker for this deal, that they can't use his statements in their case?

MR. WILSON: They can absolutely impeach him with his statements --

THE COURT: They can offer them -- they can offer them affirmatively his statements though. He was an agent of the company at the time making deals on behalf of Sherwin-Williams. What would preclude them from putting on his statements as statements of a party opponent or the agent of a party opponent?

MR. WILSON: Well, Judge, the rules of evidence on what can be used -- what deposition testimony can be used, whether a witness is available or unavailable, and they're calling --

THE COURT: No, I disagree with that. I mean there are some -- there are some hearsay exceptions that require unavailability, but statements of party opponents can be used freely. I'd permit those in your opening. Are there any specific statements that -- or evidence that he intends to get into that you think is not going to come into evidence?

MR. WILSON: Well, you know, they --

THE COURT: I've overruled the objection on representatives of Sherwin-Williams whose deposition or statements that he has; I'm going to let him do that. What else?

MR. WILSON: I'm sorry. What did you overrule? Did you just --

THE COURT: Yeah. You've objected, for example, to Garcia saying, you know, he can't use Garcia's deposition testimony. I think he can; I think he can put that in affirmatively, so --

MR. WILSON: Oh, okay.

THE COURT: -- here's what -- here's what Mr. Sorrentino asked me what my rule is. Things that are going to come in and there's not really a dispute about, they're going to come in during the course of the trial I'll allow both sides to use in their opening statements. And these things that he's talking about so far sound to me like they're legitimate things that can come into evidence.

MR. SORRENTINO: And the exhibits are ones that were cited to in the depositions, so -- the only person -- and I understand the Court's rule now -- the only person --

and I'll withdraw it -- because I gave page and lines --

THE COURT: All right.

MR. SORRENTINO: -- so the one who's not a party, is a nonparty, I will take out just to avoid an issue.

THE COURT: So, Mr. Sorrentino, here's what I'd like you to do. Go over with Mr. Wilson and preview: These are the things I'm going to use in my opening statement, and if you have an objection to it, bring it up tomorrow to Judge Burns. I've ruled on part of it already.

You know, I -- look, I think it's good advocacy to use these things in opening statement. I'm going to give you the same latitude, Mr. Wilson; whatever's coming in in evidence that you want to show them in advance in your opening statement, if there's not, you know, any real question that it's going to be inadmissible, then you're free to use those things.

MR. WILSON: Sure.

THE COURT: But, you know, talk to each other and say okay, check, check, check, I understand what you're using, so no one's caught by surprise.

MR. WILSON: That's no problem. And we'll do that. Just a clarification on the use of that -- only because some judges will not allow me to do it -- can I play the video testimony in my opening instead of just showing the transcript?

THE COURT: Sure.

MR. WILSON: Okay. That's fine.

THE COURT: I mean it's going to be admissible, right?

MR. WILSON: Yes, I think so.

MR. SORRENTINO: Yes.

THE COURT: So yes, sure.

MR. SORRENTINO: And I was going play a clip of my client, so -- and that's part of what I put in when I -- when I gave him this list.

MR. WILSON: It's unusual, but I understand what you're saying. I mean your own --

THE COURT: Look, if there are legal grounds, Mr. Wilson -- I'm not trying to rain on your parade here. If there are legal grounds to object to something and you don't think it can come in and you don't think it's going to come in because you have a righteous objection, then tell me now and I'll forbid him from using it in opening statement. On the other hand, if you don't have a good legal objection and he's going to offer it and you're going to either say no objection or you think you're going to make an objection that's going to get overruled in all likelihood under the rules, then I'll let him, and you, use that in your opening statement.

MR. WILSON: As far as I'm concerned, the only guide that we have ever used, unless there's a specific rule against it, is if you know something is inadmissible, right, or you have no chance of getting it in because it's so --

THE COURT: Correct.

MR. WILSON: -- and you use that in your opening, you get smacked, right? That's --

THE COURT: Right. Yeah, I don't want either of you to do that. But that said, I want you to make robust opening statements and use whatever devices and evidence, real evidence, that you need.

MR. WILSON: Okay. Will do.

MR. SORRENTINO: Your Honor, do you have a rule about prehighlighting exhibits or do you want us to do it on the spot as we're addressing the --

THE COURT: Actually no. I'd prefer that you, you know, you trim the exhibits. I mean I've got boxes up here, so I have to maneuver to get into my chair, and I can't imagine that all of this is going to be put in evidence. I got three boxes from you.

MR. SORRENTINO: Well, that's because we were served with 2,000 pages of testing documents.

MR. WILSON: So speaking of that, it's a request we made a few days ago or whatever, yesterday -- I've lost all track of time. I -- and I've never had a trial -- I've had a lot of trials, never had one where the parties didn't pre --

either stipulate or preadmit all but the thorniest of exhibits so that -- you know, so that when I say plaintiff's -- what's been marked as Plaintiff's Exhibit 7 -- and then I have to turn and wait to see if he's going to object --

THE COURT: No, you don't -- I'm happy for anything that will expedite the process. If you want to premark and say we have no objection to all of these, they've all been preadmitted, I'm happy to do that now.

MR. WILSON: Well, I want to do that, and I think Paul's preference is to do it as they come up, and --

MR. SORRENTINO: No.

MR. WILSON: -- that's going to take forever.

MR. SORRENTINO: No.

THE COURT: No, I agree -- I agree with Mr. Wilson on this. I mean --

MR. SORRENTINO: Your Honor, that's -- I thought we were getting together today to do that, and I guess Ed -- Mr. Woodworth was in a meeting. I don't have a problem with doing that. I suggest that if we can't get to all of them that we just simply offer it, and if there's no objection, it's just admitted if we don't object.

THE COURT: Okay. We need to have a definitive record of what's admitted, what's objected to, what's not. I'm happy to defer to the suggestion Mr. Wilson makes. You get together and you say Judge, here's our exhibits that -- and here's the opponent's exhibits, neither side has any objection to these, we ask that you deem all of them admitted, which I'll do at the beginning of the case. We'll keep a list here -- that'll actually help the clerk out because she won't have to mark as we go -- and then reserve as to those things that there's an objection, and I'll rule on the objection at the time. But that's a -- that's a tremendous time-saving measure. I agree with Mr. Wilson on that.

MR. SORRENTINO: Well, I thought we were going to do it this afternoon.

THE COURT: You can. You can. The night's young and you guys don't care about the Monday night football game tonight, right?

MR. WILSON: It's Monday?

MR. NORDLUND: Who's playing?

THE COURT: Cincinnati and -- who's Cincinnati playing tonight? I can't remember. Some bum. Some bum. Okay. I'll see you nine o'clock tomorrow morning. Any other questions about any of the Court's procedures? You're free to approach witnesses; you don't have to ask. You can move around in the well. So those things -- it's a user friendly place.

MR. WILSON: So we intend to do what these are made for, which is I'm standing here, and I'm going to say to my witness, I'm showing -- the contract, right -- I'm showing you what's been marked as Plaintiff's Exhibit 1, and Mr. Woodworth here, with his skill, is going to hit the button and it's going to pop up on these screens --

THE COURT: Here's how it works. It pops up on attorneys' screens, it pops up on the lectern, it pops up on the witness stand, and on ours. There's eight screens in the jury box and then this big screen for anybody in the gallery; it doesn't pop up until the clerk pushes a button. Now, if you say Judge, this is one of the admitted exhibits already shown, we're going to punch the button contemporaneously.

MR. WILSON: Perfect. That's it. That's all.

THE COURT: Then once admitted, once admitted, any exhibit can be shown to the jury; you don't have to ask about that.

MR. WILSON: I was told that, and I'd already forgotten it, so -- she walked me through it.

MR. SORRENTINO: We have one exhibit that is -- and I don't have the exhibit list handy, but it's one of our last exhibits. It is a hood, it is a hood, so it's a demonstrative --

THE COURT: Car hood?

MR. NORDLUND: Yes.

THE COURT: Yeah.

MR. SORRENTINO: It's wrapped in bubble wrap, but we want to bring it in tomorrow --
THE COURT: Sure.
MR. SORRENTINO: Any rules about where we put it or anything that?
THE COURT: What I'd ask is put it on -- this is usually where evidence is placed pending deliberations. So if it will fit over against there or on top of that chest, put it there.
MR. SORRENTINO: Okay.
MR. NORDLUND: And, your Honor, I had a couple of questions about the delivery of our technology and our own set of hard-copy exhibits. Do you have preference in time frame when we do that?
THE COURT: You want to set up your technology tomorrow morning. You mean before court starts?
MR. NORDLUND: Right.
THE COURT: Tish, what time are you here?
THE CLERK: 8:30. I told them they could come today after court if they wanted to.
THE COURT: Okay. Yeah. You can do it now if you have it to leave; you can do it today or be here tomorrow at 8:30, and you can set everything up.
MR. WILSON: So, Judge, should we -- with that real evidence, the physical evidence, can we just deal with that

when and if it happens because we have -- we've never seen it and we asked for that in discovery. I don't want to belabor the point now, but may we --

THE COURT: Do you have an objection to the hood?

MR. WILSON: Of course, I don't even know -- I don't even know what it looks like, and it's -- you know, who knows what it could say. Now, maybe it's just something as a demonstrative and then we could both use it, I don't know, but I --

THE COURT: What's the hood show, bad paint job?

MR. SORRENTINO: No. It's a Lexus -- it's a hood from a Lexus that was painted with the AWX, and what we did was we divided it in half just as their testing documents do their testing and we painted it with another waterborne substance that's being used right now by the same painters, same shop, same booth --

MR. WILSON: You didn't --

MR. SORRENTINO: -- so we didn't -- and we color-matched it so it's the same color.

THE COURT: So it's some kind of demonstrative evidence. You know, raise your objections --

MR. WILSON: Okay.

THE COURT: -- at the time. It's going to be in bubble wrap. Here's what I'd do. I don't generally entertain sidebar conferences, as you know, so raise issues with me before court starts or during our breaks -- 15 minutes in the morning, 15 in the afternoon, an hour for lunch -- and we'll rule on those; I'll rule on those out of the jury's presence so we don't keep them waiting. And I'm going to tell them that counsel share with me the desire to make efficient use of their time, and toward that end, we've limited this to 20 hours total, that they may not even get to that amount of time. My experience has been, as hard as this might be to understand at this point, that lawyers typically don't use the allotted time. I've only had one lawyer reach his allotted time; I think I shared that with you at pretrial conference. And, you know, it's your time. If you want to use that much time, fine, but that's what I'm going to tell the jury, that they can be prepared for 20 hours of testimony, and all of us, all five of us share the desire to make efficient use of their time. I think that will keep them more attentive during the four days.

MR. SORRENTINO: Your Honor, we'll go from 9:00 to 12:00 and then from 1:00 to --

THE COURT: 5:00.

MR. SORRENTINO: -- 5:00.

THE COURT: Yeah, unless we're just about to finish with a witness and then we'll go to 5:10 or 5:15 to get so a witness isn't inconvenienced. Okay. See you in the morning.

(The proceedings were concluded.)

Certificate of Reporter

I hereby certify that I was a duly appointed, qualified, and acting Official Court Reporter for the United States District Court at the time of reporting the above proceedings; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated November 21, 2016 at San Diego, California.

/s/ Debra M. Henson (electronic)
Debra M. Henson
Former Official Court Reporter